SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1974

No. 73-1993

SIGNAL MOUNTAIN PORTLAND CEMENT, DIVISION OF GENERAL PORTLAND CEMENT COMPANY,

Petitioner,

vs.

CHARLES H. COOLIDGE and wife, FRANCES S. COOLIDGE,

Respondents.

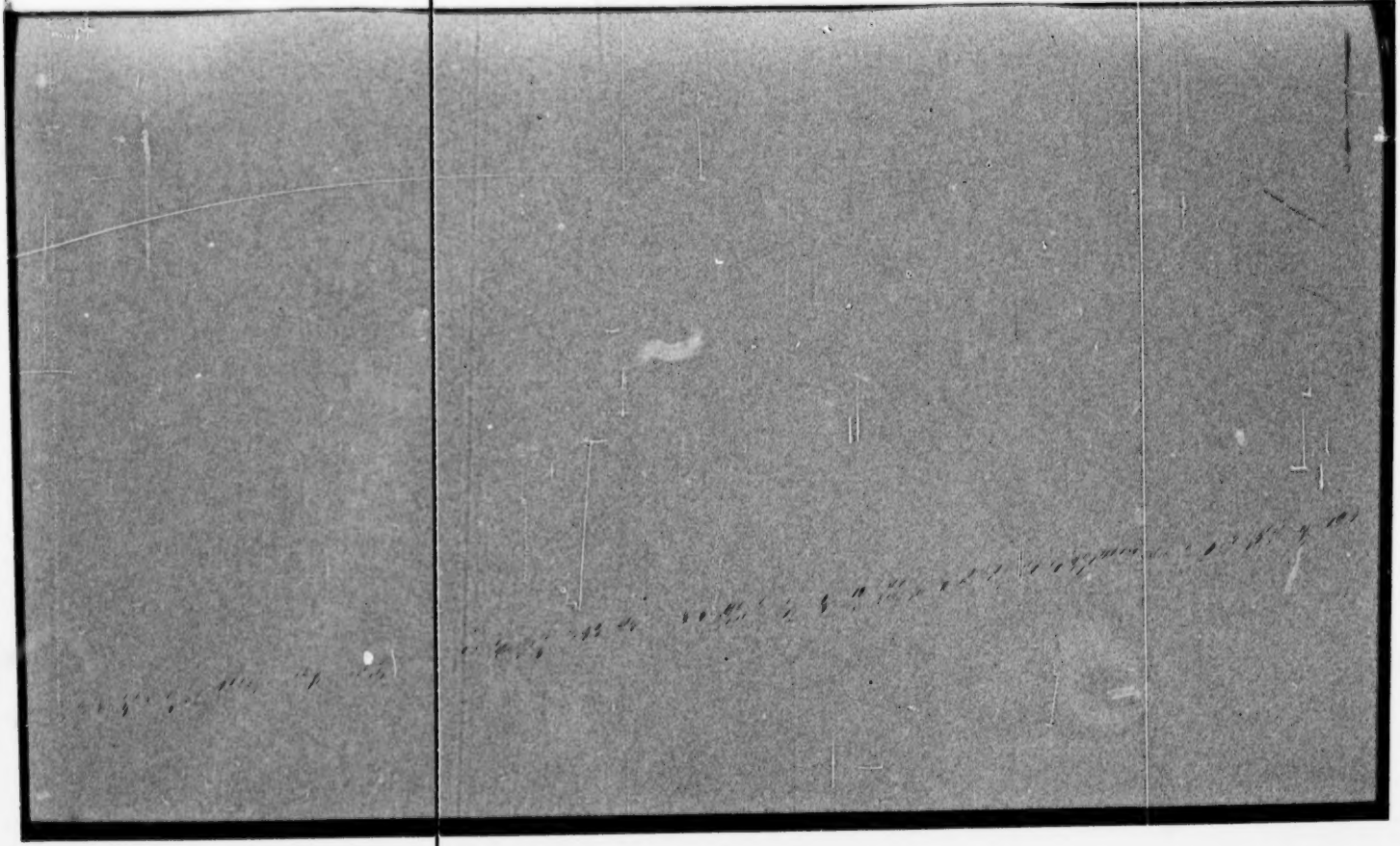
PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

THOMAS O. HELTON
ROGER W. DICKSON
450 Maclellan Building
Chattanooga, Tennessee 37402
Attorneys for Petitioner

Of Counsel:
FRANK FINN
THOMPSON, KNIGHT, SIMMONS & BULLION
Republic National Bank Building
Dallas, Texas 75201

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5447



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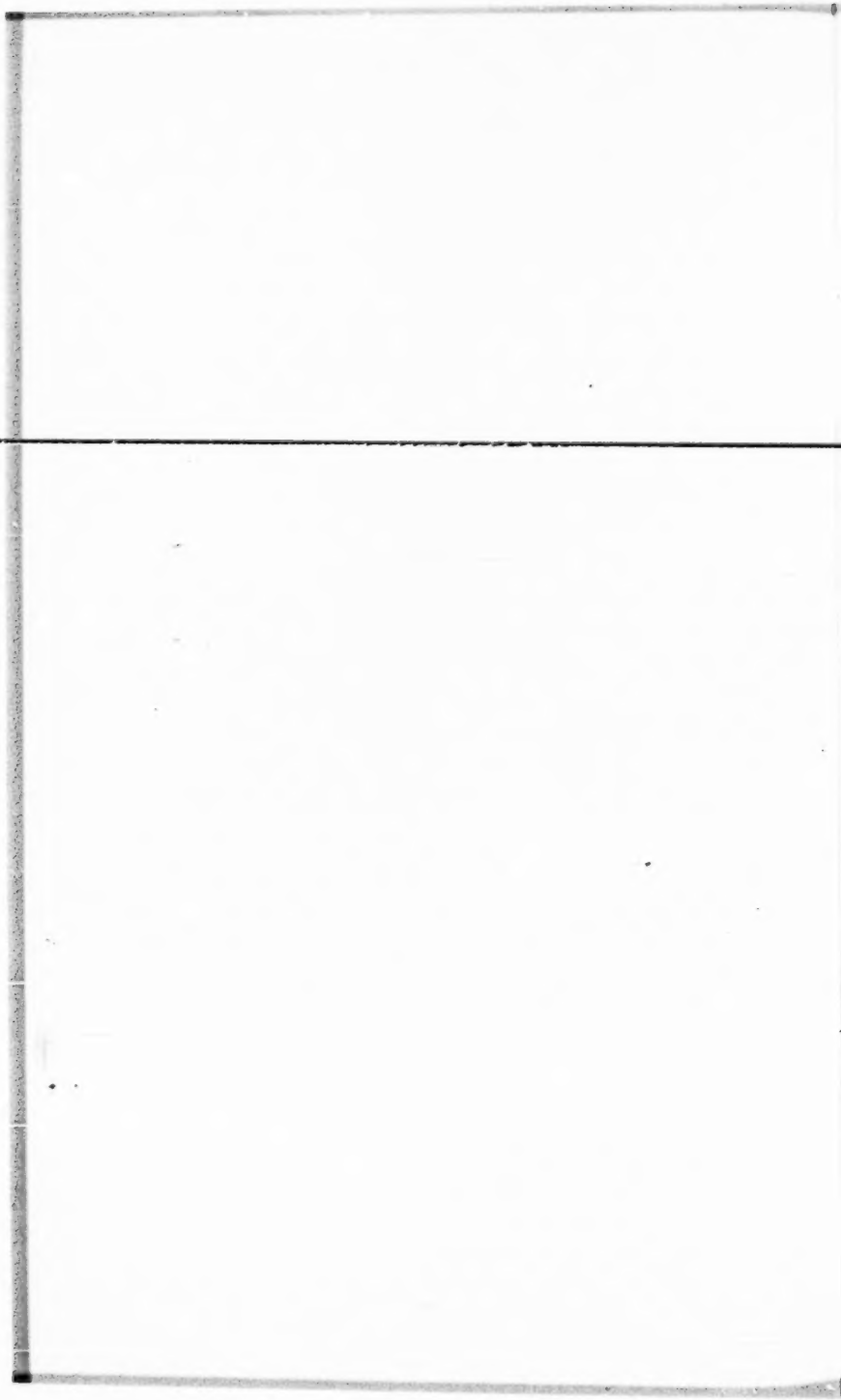

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To the United States Court of Appeals
For the Sixth Circuit

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Signal Mountain Portland Cement, Division of General Portland Cement Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered April 9, 1974.

OPINIONS BELOW

No written opinions have been reported in the official reports in this case. The order of the United States Court of Appeals for the Sixth Circuit and the relevant orders of the United States District Court for the Eastern District of Tennessee, Southern Division are reprinted in the appendix to this petition.

JURISDICTION

The order of the Court of Appeals was entered on April 9, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Was there pending before the district court a notice of dismissal upon which that court could act pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure at the time the court entered its order permitting the plaintiffs to dismiss their case, without prejudice, or, was such voluntary dismissal under Rule 41(a)(1) barred by the petitioner's pending motion for summary judgment?

UNITED STATES STATUTES INVOLVED

Federal Rules of Civil Procedure, Rule 23(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Federal Rules of Civil Procedure, Rule 41(a) *Voluntary Dismissal: Effect Thereof.*

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e), or Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Federal Rules of Civil Procedure Rule 56(a) *Summary Judgment for Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

STATEMENT OF FACTS

On March 7, 1972, Charles H. Coolidge and wife, Frances S. Coolidge (hereinafter referred to as "plaintiffs"), filed a suit in the United States District Court for the Eastern District of Tennessee, Southern Division, requesting among other things that the suit be determined a class action. On June 8, 1973, Signal Mountain Portland Cement, Division of General Portland Cement Company (hereinafter referred to as "petitioner"), filed a motion to dismiss the case as a class action, contending that the complaint failed to allege that each member of the purported class satisfied the jurisdictional amount requirement of 28 U.S.C. §1332(a). On July 11, 1973, plaintiffs filed a notice of voluntary dismissal pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. On July 17, 1973, petitioner filed a brief in opposition to plaintiffs' notice of voluntary dismissal, based on the ground that plaintiffs were before the court purporting to be representatives of a class, and therefore, a voluntary dismissal would be improper until plaintiffs had first complied with the notice provisions of Rule 23(e) of the Federal Rules of Civil Procedure. On July 17, 1973, the District Court entered an order which dismissed the case as a class action, but maintained the case on the docket as an action by the individual plaintiffs. On July 18, 1973, petitioner filed a motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, supported by an affidavit. On July 19, 1973, the district court entered an order dismissing the case without prejudice to the plaintiffs. On July 25, 1973, petitioner filed a motion to reconsider and set aside the district court's order dismissing the suit without prejudice to the plaintiffs. On August 15, 1973, the district court filed an order denying petitioner's motion to set aside the court's order permitting a dismissal of the action.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, and on April 9, 1974, that court entered an order affirming the decision of the district court.

REASONS FOR GRANTING THE WRIT

The order of the United States Court of Appeals for the Sixth Circuit should be reviewed, because it erroneously considered the chronological order of the pleadings and actions of the district court and, therefore, incorrectly decided an important question of federal law.

The basis for federal jurisdiction in this lawsuit is 28 U.S.C. 1332.

At the time the district court permitted the plaintiffs' voluntary dismissal under Rule 41(a)(1), Federal Rules of Civil Procedure, such dismissal was barred by the petitioner's pending motion for summary judgment.

At the time the plaintiffs' notice of voluntary dismissal was filed on July 11, 1973, it is clear that the notice was improper and ineffectual. The notice stated that it was filed pursuant to Rule 41(a); however, at the time the notice was filed the case was pending before the court allegedly as a class action. A suit which purports to be a class action is treated as such for purposes of dismissal until the court makes a determination as to whether the suit should proceed as a class action. *Kahan v. Rosenstiel,* 424 F.2d 161 (3rd Cir. 1970), *cert. denied, Glen Alder Corp. v. Kahan,* 398 U.S. 950, *on remand* 315 F. Supp. 1391. By the express terms of Rule 41(a), a dismissal under that Rule is subject to the provisions of Rule 23(e), which provides that class actions shall not be dismissed without approval of the court and notice to the class members.

Therefore, the plaintiffs' attempt to dismiss this case pursuant to Rule 41(a)(1), without notice to all members of the class which the plaintiffs purported to represent was completely without effect and was a nullity.

On July 17, 1973, the District Court entered an order holding that this case could not be maintained as a class action, but that the case would remain on the docket as an independent action on behalf of the plaintiffs. No further action of any kind was taken by the plaintiffs following that order. However, because of the changed posture of the suit, for the first time the petitioner was in a position to move for a summary judgment and did so on July 18, 1973. Subsequent to the filing of the petitioner's motion for summary judgment, the court entered an order dismissing the case in its entirety, apparently based upon the plaintiffs' notice of dismissal filed on July 11, 1973.

At the time the district court entered its order of dismissal, there was no pleading before the court requesting that the case be dismissed and the dismissal was therefore improper.

It was only after the district court ruled that the case could not be maintained as a class action would it have been possible for the plaintiffs to dismiss the action in the manner which they had attempted. However, the plaintiffs did not file a notice of dismissal after July 17, 1973, nor did they take any action to dismiss their case.

The effect of the district court's order of dismissal is to treat as proper and to resurrect a pleading which was admittedly improper and a nullity when filed. At the time the court entered its order, the plaintiffs had no right to dismiss their case, since on July 18, 1973, petitioner had filed a motion for summary judgment. See Rule 41(a)(1), Federal Rules of Civil Procedure.

The chronological order of the filing of the various pleadings and the District Court's orders is the crux of the petitioner's position. However, this chronological order was erroneously construed by the Circuit Court. In its order filed April 9, 1974, the Circuit Court stated:

> The appellant on June 8, 1973, filed a motion to dismiss the class action upon the ground that the complaint failed to state that each member of the class satisfied the jurisdictional amount required in a diversity action. The district court dismissed the action as to all members of the class (except the named plaintiffs-appellees) because of the failure to allege the requisite jurisdictional amount. *Thereafter, the appellees moved the court for a voluntary dismissal which the appellant opposed.* Later the appellant moved for a summary judgment. After the motion for a summary judgment was filed, the district court dismissed the case without prejudice to the appellees. (Emphasis added.)

It is obvious that the Circuit Court incorrectly affirmed the district court, since its order indicates the Circuit Court was under the impression that the plaintiffs moved the court for a voluntary dismissal after the district court had dismissed the action as a class action. The plaintiffs' notice of voluntary dismissal was filed with the district court prior to the district court's action of dismissing the case of the class action and, therefore, was improper and a nullity when filed. No action was taken by the plaintiffs after the dismissal of the case as a class action but prior to the petitioner's filing of a motion for summary judgment on July 18, 1973, and the district court therefore incorrectly acted on an improper notice of voluntary dismissal on July 19, 1973. The order of the Circuit Court

clearly indicates that the decision of the district court was erroneously affirmed.

It is the petitioner's contention that a court must consider pleadings in connection with the posture and status of the case at the time the pleading is filed. The impropriety and confusion which would be created by a court considering a pleading filed improperly after the posture of a lawsuit is changed is obvious.

In view of the above, the plaintiff was not entitled to utilize the provisions concerning the dismissal as a matter of right under Rule 41(a)(1), and the district court's order of July 9, 1973, dismissing the case without prejudice was erroneous and should have been reversed by the Circuit Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS O. HELTON
ROGER W. DICKSON
STOPHEL, CALDWELL & HEGGIE
450 Maclellan Building, West
Chattanooga, Tennessee 37402
Telephone—615/267-6723
Attorneys for Petitioner

Of Counsel:
FRANK FINN
THOMPSON, KNIGHT, SIMMONS & BULLION
Republic National Bank Building
Dallas, Texas 75201

APPENDIX

ORDER OF DISTRICT COURT

(Filed July 19, 1973)

Civil Action No. 6458

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

CHARLES H. COOLIDGE, *et al.*,

VS.

SIGNAL MOUNTAIN PORTLAND CEMENT, Division of GENERAL PORTLAND CEMENT COMPANY

ORDER

A notice of voluntary dismissal has been filed herein by the plaintiffs. It appears that this case has heretofore been dismissed as a class action and remains pending before the Court only as an individual action by the named plaintiffs. It further appears that no answer or motion for summary judgment had been filed in the case prior to the filing of the notice of voluntary dismissal.

It is accordingly ORDERED that this lawsuit be and the same is hereby dismissed without prejudice to the plaintiffs' right to refile the same, this dismissal being entered pursuant to Rule 41(a) (1), *Federal Rules of Civil Procedure.*

APPROVED FOR ENTRY.

/s/ FRANK W. WILSON
United States District Judge

ORDER OF DISTRICT COURT

(Filed August 15, 1973)

Civil Action No. 6458

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

CHARLES H. COOLIDGE, *et ux*,

vs.

SIGNAL MOUNTAIN PORTLAND CEMENT, Division of GENERAL PORTLAND CEMENT CO.

ORDER

This case is presently before the Court upon the defendant's motion that the Court reconsider its order entered July 19, 1973 which, pursuant to F.R.C.P. 41(a) (1), dismissed the plaintiffs' lawsuit without prejudice. This lawsuit was filed purportedly as a class action. Upon July 11, 1973, plaintiffs filed a notice of voluntary dismissal pursuant to F.R.C.P. 41(a) (1); the defendant resisted this dismissal, arguing that inasmuch as this purported to be a class action, compliance with F.R.C.P. 23(e) precluded voluntary dismissal under F.R.C.P. 41(a) (1). The Court on July 17, 1973 determined that this lawsuit could not appropriately be maintained as a class action and ordered dismissal of the class action aspects of the case. Thereafter on July 19, 1973 the Court granted the plaintiffs' motion for a voluntary dismissal pursuant to F.R.C.P. 41(a) (1), since no answer or motion for summary judgment had been filed by defendant prior to the plaintiffs' filing the notice of voluntary dismissal. In the

meanwhile, on July 18, 1973 the defendant filed a motion for summary judgment.

The defendant contends that the plaintiffs' notice of voluntary dismissal (filed July 11, 1973) was a nullity and therefore could not be revived by the Court's dismissal of this suit as a class action upon July 17, 1973. Consequently, when the defendant moved for summary judgment upon July 18, 1973, there was no valid notice of dismissal and, of course, after that time voluntary dismissal upon notice by the plaintiff was forestalled. Hence, it is argued, the Court's dismissal without prejudice was improper.

It is true that the plaintiffs' notice of dismissal when filed was, at that time, not subject to ordinary disposition under F.R.C.P. 41(a) (1). This is so because of the established rule that in the interim between institution of a suit as a class action and the Court's decision as to whether it may be so maintained, the suit should be treated as a class action. 3B *Moore's Federal Practice* ¶ 23.50. This practice comports with the general rules as to pleading but, more importantly, protects the rights of unidentified class members and discourages abuse of the class action device. However, the Court finds neither logic nor precedent for the proposition that the subject notice was rendered a nullity by reason of the class action allegations.

Moreover, a close analysis of the problem leads this Court to conclude that when a court makes its F.R.C.P. 23(c) (1) determination as to whether a purported class action is properly maintainable as such, the Court thereby determines "what the lawsuit has always been, not what it is about to become." *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 42 F.R.C. 324 (E.D. Pa. 1967).

Thus, although a suit filed as a purported class action is treated as such for various reasons of policy until the F.R.C.P. 23(c) (1) determination, such determination relates back to the date of the commencement of the action. It can be reasonably said that an action brought as a class action either possesses or lacks the elements essential to a class action from the date of its inception. The presence or absence of those elements merely awaits a judicial determination. There was, then, a valid notice of dismissal outstanding prior to the defendants' motion for summary judgment and it was not improper for the Court to so adjudicate.

It is accordingly ORDERED that the defendant's motion to set aside the Court's order of July 19, 1973 adjudicating a dismissal of this lawsuit without prejudice is hereby denied.

APPROVED FOR ENTRY.

/s/ FRANK W. WILSON
United States District Judge

JUDGMENT OF COURT OF APPEALS

(Filed April 9, 1974)

No. 73-2015

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SIGNAL MOUNTAIN PORTLAND CEMENT,
Division of General Portland Cement Co.,
Defendant-Appellant,

v.

CHARLES H. COOLIDGE and Wife,
FRANCES S. COOLIDGE,
Plaintiffs-Appellees.

ORDER

Before: PHILLIPS, *Chief Judge*, PECK and MILLER, *Circuit Judges.*

The appellees filed their complaint as a class action seeking damages and injunctive relief because of the appellant's operation of a cement plant near Signal Mountain, Tennessee. The appellant on June 8, 1973, filed a motion to dismiss the class action upon the ground that the complaint failed to state that each member of the class satisfied the jurisdictional amount required in a diversity action. The district court dismissed the action as to all members of the class (except the named plaintiffs-appellees) because of the failure to allege the requisite jurisdictional amount. Thereafter, the appellees moved the court for a voluntary dismissal which the appellant opposed. Later the appellant moved for summary judg-

ment. After the motion for summary judgment was filed, the district court dismissed the case without prejudice to the appellees. Motions by the appellant to set aside and to reconsider the dismissal were denied by the court.

On appeal, it is argued by the appellant that the district court erred in allowing a voluntary dismissal when a motion for summary judgment was pending and undisposed of.

Upon full consideration, the Court is of the opinion that the argument of the appellant is without merit, and that the order of dismissal without prejudice entered by the district court should be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HELMAN
Clerk